BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROY C. PETERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,043,065
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent appeals the July 29, 2010, Award of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was awarded benefits for a 10 percent whole person functional impairment, followed by a 65 percent permanent partial general (work) disability for injuries suffered on December 26, 2007. The ALJ determined that claimant had suffered a personal injury by accident which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Melinda G. Young of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on January 21, 2011. Tom Arnhold was appointed as Board Member Pro Tem for the purposes of this appeal.

ISSUES

1. What is the nature and extent of claimant's injury and disability? Respondent argues that claimant should be limited to his functional impairment of 10 percent to the whole person as claimant retains the ability to work his regular job and only lost the job due to claimant's refusal to work an 8-hour day. Respondent

further argues that claimant's task loss should be determined to be zero percent. The 30 percent task loss set forth by Pedro A. Murati, M.D., was "simply pulled out of the air"[1] and should be denied. Sandra D. Barrett, M.D., on the other hand, found that claimant had suffered no task loss. Claimant contends that the 20 percent whole person functional impairment set forth by Dr. Murati and the 65 percent whole person permanent partial general (work) disability set forth in the Award should be affirmed.

2. Did the ALJ err in calculating this award? Respondent argues that the calculation of this award was done incorrectly, with claimant being awarded both a 10 percent whole person functional disability and, in addition, a work disability under K.S.A. 44-510e.

3. Is respondent entitled to a credit pursuant to K.S.A. 2007 Supp. 44-501(c) for a preexisting functional impairment from an injury suffered while claimant was working in Missouri? Claimant settled a prior workers compensation claim in Missouri in February 1994 for a 27 percent whole person disability. Respondent contends that it is entitled to an offset for this preexisting impairment. Claimant contends that the prior settlement rating was not calculated pursuant to the fourth edition of the AMA *Guides*.[2] Therefore, no credit can be allowed. Respondent further contends that claimant's task loss must be adjusted as at least two tasks on vocational expert Karen Terrill's list had been omitted from claimant's ability due to the injuries suffered previously in Missouri. Claimant argues that the law in Kansas does not allow for the omission of tasks as the result of prior injuries.

FINDINGS OF FACT

Claimant was employed as a human services specialist for respondent. This job required that claimant sit at a computer 8 hours per day and type. On December 26, 2007, claimant slipped on a floor mat in the bathroom and fell. He heard and felt a pop in his low back. Claimant reported the incident and was referred for medical treatment. Claimant was initially diagnosed by his primary physician, Dr. Davidson, with muscle spasms. An MRI on January 10, 2008, showed a large central and right disk protrusion and extrusion at L4-5, producing moderate to severe right neuroforaminal stenosis and severe central spinal stenosis. Claimant had mild to moderate degenerative disk disease at L3-4 with mild to moderate bilateral neuroforaminal stenosis. Claimant was referred by Dr. Davidson to board certified neurosurgeon Gery Hsu, M.D. On February 28, 2008, Dr. Hsu performed

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[1] Respondent's brief at 9.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

a left L4-5 laminotomy for decompression of the L5 nerve root. Claimant continued to experience low back pain after the surgery and followed up with Dr. Davidson, after Dr. Hsu left practice in Kansas. Claimant was given work restrictions from Dr. Hsu's physician's assistant and was then referred for treatment to board certified physical medicine and rehabilitation specialist Sandra D. Barrett, M.D.

Dr. Barrett first examined claimant on June 13, 2008. Due to ongoing and persistent pain complaints from claimant, and a followup MRI, Dr. Davidson recommended a surgical consult with Ali B. Manguoglu, M.D. Claimant was first examined by Dr. Manguoglu on August 26, 2008. It was recommended that claimant undergo epidural injections, which were administered under the supervision of Dr. Thompson. Dr. Manguoglu later recommended a lumbar myelogram, which was administered on December 12, 2008. The myelogram suggested an L4-5 disk abnormality. A post myelographic CT showed degenerative disk disease and spinal stenosis at L3-4 and L4-5. An EMG/nerve conduction study on January 5, 2009, revealed bilateral L5-S1 radiculopathy, worse on the left than the right. On January 22, 2009, claimant underwent a re-exploratory decompressive laminectomy at L3-4 and a microdiskectomy at L3-4 on the left side under the care of Dr. Manguoglu. After the surgery, claimant underwent physical therapy and was provided work restrictions. On June 30, 2009, claimant was released, as Dr. Manguoglu determined that there was nothing further to be done.

Kathy Jo Mattison, respondent's human resource professional III, testified for respondent in this matter. Claimant had been returned to work on May 21, 2008, with a 4-hour-per-day restriction with no lifting over 5 pounds and claimant was to sit, stand and walk at his discretion. Claimant continued to work until January 2009 when he had additional surgery. Claimant was again returned to work on May 27, 2009, with the half-time restriction and the lifting and moving restrictions remaining.

Ms. Mattison stated that claimant had suffered from long-term back trouble. He was always stiff. Claimant's medical history is significant. In 1993, claimant suffered a work-related injury while working in Missouri. That matter was settled based upon a 27 percent whole body functional impairment and a $25,000.00 lump sum payment. There is no indication which, if any, version of the AMA *Guides* was used to determine this level of impairment. Claimant had undergone a left hemilaminotomy with a diskectomy in March 1993. He suffered another back injury on May 9, 1993, for which he was paid an additional sum of $4,316.72, on a strict compromise basis. Claimant went to work for respondent in September 1994, shortly after recovering from the 1993 injuries.

Claimant's back problems continued after beginning with respondent. In 1995, claimant was placed on hydrocodone for his back pain. In 1997, claimant advised a Dr. Pauly that he was unable to sit in a chair due to his low back pain. Dr. Pauly had placed claimant on Ultram. Additionally, by January 2007, claimant was on Lortab for

pain and in April 2007, claimant was taking both Lortab and Diazepam (Valium). During the five-year period leading up to this accident, claimant had undergone several injections into his low back. In September 2007, claimant went to the Hutchinson Hospital emergency room and was treated by Dr. Mills. Claimant discussed his prior back problems with Dr. Mills and stated that he had been doing light duty ever since. In 1993, claimant was given a 35-pound occasional lifting restriction and a 15-pound frequent lifting restriction. Claimant admitted that he was also limited in stooping, bending and lifting.

Respondent took claimant back to work with the 4-hour limitation, and claimant worked within that restriction until his termination on October 9, 2009. Claimant underwent a functional capacity evaluation (FCE) on July 14, 2009. Per the FCE, claimant was to avoid lifting from the ground but could lift up to 30 pounds from 6 inches. Claimant was also to alternate sitting, standing and walking. It was noted in the report that claimant stopped the test while providing sub-maximum effort. There was no indication on the FCE that claimant was limited to part-time employment. By October 2009, claimant had been returned to full-time employment by his doctor.[3] When claimant was requested to return to full-time employment, claimant refused, stating that he was unable and unwilling to work beyond the 4-hour day he had been working. Respondent advised that it needed a full-time employee and claimant's refusal to work full time would result in his termination. When claimant continued to refuse full-time employment, he was terminated, effective October 9, 2009. Ms. Mattison testified that claimant's restrictions were being met by respondent. Had claimant remained on the job, the restrictions would have continued. As noted above, claimant's job required no lifting. Additionally, claimant could stand, sit and walk as needed, both before and after the work-related accident. At the time of the regular hearing, claimant remained unemployed.

Dr. Barrett last examined claimant on February 11, 2010. Dr. Barrett diagnosed claimant with residual back pain with radiation into the lower extremity. She rated claimant with a 10 percent impairment of the whole person, placing claimant in DRE (lumbosacral) category III of the fourth edition of the AMA *Guides*.[4] Claimant was restricted to sedentary duties, including a 10- to 15-pound weight limit with periods of sitting and standing as tolerated. Dr. Barrett was provided a copy of Karen Terrill's task analysis. Of the 9 tasks on the list from claimant's job with respondent, claimant would not be able to perform tasks 2 and 3. However, if claimant was free to get up and move around as needed, he would be able to do tasks 2 and 3. When Dr. Barrett was told that claimant was able to get up and walk around, she determined that claimant was not restricted from performing any of the tasks with respondent. Dr. Barrett was also provided the task list from claimant's previous job at a tire store. Of the 7 tasks on the list, claimant was unable to perform 3.

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[3] Mattison Depo. at 11.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the fourth edition of the Guides unless otherwise noted.

Thus, claimant would be unable to perform 3 of 16 tasks for a task loss of 19 percent. Dr. Barrett did not restrict claimant's ability to work an 8-hour day.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., on August 19, 2009. At the time, claimant was still employed with respondent, working part time. The history provided Dr. Murati was consistent with the earlier histories provided the other evaluating and treating physicians. Dr. Murati was provided medical records from claimant's prior treatment, including office notes and records, x-ray reports, EMG/nerve conduction studies, CT scan reports, myelograms and surgical reports. Claimant was diagnosed with failed back syndrome, post decompressive laminectomies at L3-4 with a left microdiskectomy, post decompressive laminectomies at L3-4 and microdiskectomy at L3-4 from a re-exploration surgery and bilateral sacroiliac joint dysfunction. Dr. Murati opined that even though claimant was working, he did not expect claimant to remain so for very long. Once claimant is discharged, he would be essentially and realistically unemployable.

Dr. Murati restricted claimant from working an 8-hour day, with claimant rarely sitting and occasionally standing or walking. Claimant should not bend, crouch, crawl or stoop. Claimant should only rarely sit, climb stairs, climb ladders or squat. Claimant should only lift, carry, push or pull 10 pounds occasionally or 5 pounds frequently. Claimant should be allowed to rest every hour for 30 minutes and alternate sitting, standing and walking. In reviewing the task list prepared by Karen Terrill, Dr. Murati opined that claimant was unable to perform any of the 9 tasks on the list, for a 100 percent task loss. Dr. Murati's report and opinion did not take into account any of claimant's prior back injuries. Claimant fell under the Lumbosacral DRE Category IV for a 20 percent whole person functional impairment, pursuant to the fourth edition of the AMA *Guides*. Dr. Murati warned that claimant would probably need a fusion in the near future, and would need chronic pain management and possibly a spinal cord stimulator for the back problems.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

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[5] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[9]

The ALJ awarded claimant a 10 percent whole person permanent partial impairment based on the opinion of Dr. Barrett. While Dr. Murati determined that claimant had a 20 percent whole person impairment, his method of using the fourth edition of the AMA *Guides* left something to be desired. As noted by the ALJ, Dr. Murati used the range of motion method when rating claimant, while the *Guides* clearly indicate that the DRE category is the preferred method. Dr. Barrett used the *Guides*, analyzing claimant's impairment using the DRE method. The Board agrees with the ALJ's adoption of Dr. Barrett's rating opinion as the most credible, and that opinion is adopted by the Board.

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[7] K.S.A. 2007 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] K.S.A. 44-510e(a).

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[10]

The ALJ found the task loss opinion of Dr. Murati to be suspect. The determination by Dr. Murati that claimant was incapable of performing certain tasks, while claimant was actually performing these tasks, casts doubt on Dr. Murati's opinion. The ALJ went on to find a task loss between Dr. Murati's 100 percent and Dr. Barrett's 19 percent in determining that claimant had suffered a 30 percent task loss. However, this result gives credibility to Dr. Murati's opinion, which the ALJ had earlier determined lacked credibility. The Board finds that the opinion of Dr. Barrett carries the most weight in this matter and finds that claimant has suffered a 19 percent task loss.

The wage loss factor in K.S.A. 44-510e is easily calculated. Claimant's reduced work schedule through October 9, 2009, resulted in a wage loss of 46 percent. After October 9, 2009, claimant was no longer working and his wage loss was 100 percent. Respondent contends that the literal reading of the statute, as required by *Bergstrom*,[11] is wrong. The reasoning behind respondent's argument is not explained in its brief to the Board. *Bergstrom* is not ambiguous or difficult to understand. The Kansas Supreme Court has determined that there is no statutory requirement that a worker make a good faith effort to seek post-injury employment or to mitigate an employer's liability. If a claimant is not working, regardless of the reason, the wage loss is 100 percent.

Pursuant to K.S.A. 44-510e, claimant has a work disability of 32.5 percent through October 9, 2009, and a work disability of 59.5 percent beginning October 10, 2009. The Award will be modified accordingly.

Respondent's argument, that the award was in excess of that allowed by statute, is not supported in this record. The ALJ's calculation is consistent with the calculation method utilized by the Board. However, the modification of the work disability herein will result in a recalculation of the award. Thus, respondent's objection is rendered moot.

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[10] K.S.A. 44-510e.

[11] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

> (c) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[12]

Respondent contends entitlement to a reduction of the award based upon the settlement of claimant's prior workers compensation case in Missouri. It is uncontested that claimant was awarded a 27 percent whole body functional impairment from those injuries. However, there is nothing in this record to verify that the impairment was determined pursuant to the fourth edition of the AMA *Guides*. The 10 percent functional impairment determined by Dr. Barrett was not qualified in any way by a preexisting impairment. Without evidence that the claimed preexisting functional impairment was determined pursuant to the fourth edition of the AMA *Guides*, and without any physician herein expressing an opinion on claimant's percent of preexisting impairment, no credit pursuant to K.S.A. 2007 Supp. 44-501(c) can be awarded.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the award of a 10 percent whole person functional impairment, but modified to award claimant a permanent partial general (work) disability of 32.5 percent through October 9, 2009, followed by a permanent partial general (work) disability of 59.5 percent from October 10, 2009, forward. Respondent is denied a K.S.A. 2007 Supp. 44-501(c) credit for a preexisting functional impairment. In all other regards, the award of the ALJ is affirmed so long as it does not contradict the findings and conclusions contained herein.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own insofar as they do not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated July 29, 2010, should be, and is hereby, affirmed with regard to the 10 percent functional whole person impairment awarded, but modified to award claimant a 32.5 percent permanent partial general

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[12] K.S.A. 2007 Supp. 44-501(c).

disability through October 9, 2009, followed by a 59.5 percent permanent partial general disability thereafter.

The remainder of the award is affirmed insofar as it does not contradict the findings and conclusions contained herein.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Roy C. Peterson, and against the respondent, State of Kansas, and its insurance carrier, State Self-Insurance Fund, for an accidental injury which occurred on December 26, 2007, and based upon an average weekly wage of $694.28 through October 9, 2009, and an average weekly wage of $832.65 thereafter.

Claimant is entitled to 49.87 weeks of temporary total disability compensation at the rate of $462.88 per week or $23,083.83, followed by 38.00 weeks of permanent partial disability compensation at the rate of $462.88 per week totaling $17,589.44 for a 10 percent whole person functional impairment, followed by 55.29 weeks of permanent partial disability compensation at the rate of $462.88 per week totaling $25,592.64 for a 32.50 percent work disability, followed by permanent partial disability compensation at the rate of $510.00 per week commencing October 10, 2009, for a 59.50 percent work disability, for a total award not to exceed $100,000.00.

As of March 8, 2011, there would be due and owing to the claimant 49.87 weeks of temporary total disability compensation at the rate of $462.88 per week in the sum of $23,083.83, plus 93.29 weeks of permanent partial disability compensation at the rate of $462.88 per week in the sum of $43,182.08, plus 23.71 weeks of permanent partial disability compensation at the rate of $510.00 per week in the sum of $12,092.10, for a total due and owing of $78,358.01, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $21,641.99 shall be paid at the rate of $510.00 per week until fully paid or until further order from the Director.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, she must file and submit her written contract with claimant for approval.[13]

IT IS SO ORDERED.

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[13] K.S.A. 44-536(b).

Dated this ____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge